

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 14, 2006 Session

JUDY ANN PIPER v. RANDY GLENN PIPER

**Appeal from the Circuit Court for Sumner County
No. 26150-C C.L. Rogers, Judge**

No. M2005-02541-COA-R3-CV - Filed on February 1, 2007

Appellant appeals the Trial Court's ruling designating Appellee as primary residential parent of the parties' two minor children. However, Appellant failed to provide the Court of Appeals with a complete record of the lower court proceedings; specifically, a transcript of a new trial on the matter was absent from the appellate record. Therefore, based upon the incomplete record, this Court cannot review the facts and must affirm the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Laura Y. Goodall, Gallatin, Tennessee; Robert Todd Jackson, Brentwood, Tennessee, for the appellant, Randy Glenn Piper.

Russell E. Edwards, Hendersonville, Tennessee, for the appellee, Judy Ann Piper.

OPINION

I. FACTUAL BACKGROUND

Randy Glenn Piper (Appellant) and Judy Ann Piper (Appellee) were married in Sumner County, Tennessee on August 19, 1994. They separated on October 7, 2004. The marriage produced two children, born in 1995 and 2000. Appellee filed a Complaint for Divorce on October 25, 2004, alternatively alleging inappropriate marital conduct, irreconcilable differences, and Tennessee Code Annotated section 36-4-129¹. In her Complaint for Divorce, Appellee requested that (1) she be

¹**36-4-129. Stipulated grounds and/or defenses - Grant of divorce.**

(a) In all actions for divorce from the bonds of matrimony or legal separation the parties may stipulate as to grounds and/or defenses.

established as the primary residential parent of the parties' minor children, (2) Appellant pay child support, (3) the Court adopt her proposed Temporary Parenting Plan, (4) the Court award her *pendente lite* and permanent spousal support, (5) the Court distribute the debts and property of the parties, and (6) the Appellant pay her attorney's fees and court costs.

On December 3, 2004, the court issued an Agreed Temporary Parenting Plan naming Appellee primary residential parent and setting forth the responsibilities of each parent. On January 31, 2005, Appellant filed a Counter-Complaint for Divorce, citing irreconcilable differences, inappropriate marital conduct, and adultery. He requested joint custody of the children.

The court issued its Final Decree of Divorce on March 7, 2005. The relevant portions state as follows:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED BY THE COURT that pursuant to T.C.A. Section 36-4-129, the parties are declared divorced by absolute divorce, and the parties are restored to the rights and privileges of single persons.

...

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that the Wife's proposed Permanent Parenting Plan is adopted and incorporated by the Court...

...

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that the Husband shall be entitled to claim the youngest child as a dependent for income tax purposes so long as the Husband is current in child support as of January 15th of each year. The Wife shall claim the older child for tax purposes. When the oldest child no longer receives child support, then the parties shall rotate the remaining tax dependency, and exchange tax returns by April 15th of each year.

...

IT IS FURTHER ORDERED ADJUDGED AND DECREED BY THE COURT that each party shall be responsible for their own attorney fees.

On March 11, 2005, Appellee filed a Motion to Alter or Amend Final Decree of Divorce, "with respect to the refusal of the Trial Court to award [Appellee] her attorney's fees...." On March 14, 2005, Appellant filed his own Motion to Alter or Amend, maintaining that the trial court erred in failing to designate him as primary residential parent. Further, in the event the court allowed Appellee to retain primary residential parent status, Appellant sought modification of the visitation schedule set forth in Appellee's proposed Permanent Parenting Plan adopted by the Decree. On

¹ (...continued)

(b) The court may, upon stipulation to or proof of any ground for divorce pursuant to § 36-4-101, grant a divorce to the party who was less at fault or, if either or both parties are entitled to a divorce, declare the parties to be divorced, rather than awarding a divorce to either party alone.

April 7, 2005, the court issued its Order regarding the parties' Motions and granted an evidentiary hearing:

On April 4, 2005 the Plaintiff's Motion to Alter or amend the Final Order of Divorce entered March 7, 2005 was presented on the issue of Plaintiff's attorneys fees. The Defendant also presented a Motion to Alter or Amend the said Final Order of Divorce raising the issues of Permanent Residential Parent or Sunday residential time.

The Plaintiff's Motion for Attorneys Fees is not well taken and denied. Both parties admitted and stipulated equal fault for the marriage break-up. No real assets exist except for the small amount of equity in the real property which the parties agreed prior to the trial as to the disposition of. The income and expense including child support payment found as to the Defendant do not support the Defendant's ability to pay. The Court found both parties in contempt during the pendency of this divorce.

The Defendant's motion requests the Court to alter its placement of the children with the Mother as primary residential parent or extend the alternate residential parent Sunday visitation until 6:00 p.m. Tennessee Rules of Civil Procedure 59.04 allows such a motion to be granted if it is shown that established controlling law has changed before the Final Judgment, or previously unavailable evidence is now available, or to correct a clear error of law or to prevent injustice. In dealing with the best interest of children the Court will allow an evidentiary hearing in support of Defendant's T.R.C.P. 59.04. At the presentation of these motions the Court simply heard the arguments of counsel. Therefore counsel are directed to reach an agreement as to an early hearing date.

On May 17, 2005, the court issued the following Order, based upon the Appellant's Motion, granting a new trial:

The Father's Motion to Alter or Amend the Final Decree of Divorce entered March 7, 2005 came on for hearing. The Court finds that said Motion was filed by the Father on March 14, 2005. The Court further finds based upon the Motion and facts presented through testimony, a new trial shall be granted on the issue of Permanent Residential Parent and Permanent Parenting Plan for the children. The parties are Ordered to set as soon as possible, a trial of these issues. The Court specifically finds that the child care evidence presented to the Court appears it may not be as was represented and the Court directs presentation of any evidence now available, if any. The Court further finds that in order to prevent even a possible injustice to the children this action of granting said motion is taken. All other pending issues regarding attorneys fees and child support shall be held in abeyance until further orders of the Court.

The new trial took place on August 31, 2005. On September 2, 2005, the court issued a Memorandum adopting an Amended Permanent Parenting Plan. The Amended Permanent Parenting Plan addressed numerous issues, the relevant ones noted below:

On August 31, 2005, a Permanent Parenting Plan hearing was held before this Court. Based upon the testimony, exhibits and trial court record, this Court finds and Orders:

...

(h) The Father shall receive the youngest child for tax exemption as long as all child support is current as of January 15th of the year following the tax year.

(j) Primary Residential Parent - Mother shall be designated as Primary Residential Parent.

...

3. All other issues regarding contempt petitions, request for attorney's fees, and Court Costs are reserved for further hearing. The March 7, 2005 Final Order on all other non permanent parenting plan matters has not been set aside, modified or amended.

The Order issued from the August 31, 2005 new trial states as follows:

This cause came to be heard on the 31st day of August, 2005, before the Honorable C.L. Rogers, Judge for the Circuit Court for Sumner County, Tennessee, upon a hearing to determine modification of the Permanent Parenting Plan entered on March 7, 2005, upon testimony of both parties, upon testimony of witnesses of both parties, upon argument of counsel, and from the entire record in this cause, from all of which the Court issued a Memorandum dated September 2, 2005, which is hereby incorporated and attached hereto:

IT IS, THEREFORE, ORDERED & ADJUDGED BY THE COURT that the attached Amended Permanent Parenting Plan is hereby approved by this Honorable Court.

IT IS FURTHER ORDERED & ADJUDGED BY THE COURT that all matters contained in the original Final Decree and Permanent Parenting Plan entered on March 7, 2005, not heretofore modified, shall remain in full force and effect.

IT IS FURTHER ORDERED & ADJUDGED BY THE COURT that this Order shall constitute a final Order from the divorce hearing held on March 7, 2005.

IT IS FURTHER ORDERED & ADJUDGED BY THE COURT that any issues remaining in the post divorce petition for contempt, attorney fees and court costs, shall be reserved for further hearing.

All other matters are reserved.

Both parties appeal. Appellant appeals the Trial Court's designation, following the new trial, of Appellee as the children's primary residential parent on the basis that "such designation was not in the best interest and welfare of the minor children based on the proof presented at the final hearing of this cause." Appellee appeals, claiming: (1) the Trial Court erred in not allowing her to claim tax exemptions for both children, (2) the Trial Court erred in not awarding her attorney's fees incurred during the divorce proceedings, and (3) she should be awarded her attorney's fees incurred during the appeal.

II. STANDARD OF REVIEW

The standard of review has become the primary issue in this case. The Trial Court granted a new trial on the issues of Primary Residential Parent status and a Permanent Parenting Plan. The new trial took place on August 31, 2005, and Appellee was again designated Primary Residential Parent. Appellant appeals this ruling; the only issue raised by Appellant goes to the evidence presented at the August 31, 2005 hearing. However, the Appellant did not provide this Court with a complete record; the transcript from the August 31, 2005 hearing is absent from the appellate record. At oral argument before this Court, counsel for Appellant cited a lack of funds as the reason for the incomplete record.

There has been considerable back-and-forth between the parties regarding the absent August 31, 2005 transcript. On March 9, 2006, Appellee filed a Motion pursuant to Tennessee Rule of Appellate Procedure 26(b)², demanding that this Court “either dismiss this appeal or require the Defendant/Appellant...to supplement the record to include the correct transcript and to amend his brief to cite to the correct transcript.” As a basis for this Motion, Appellee cited Tennessee Rules of Appellate Procedure 24 and 25. This Court issued an Order on the matter on March 16, 2006, stating that “the appellee shall have ten (10) days within which to file with the trial court clerk a designation of additional parts of the transcript to be included in the record pursuant to Tenn. R. App. P. 24(b).” Appellee did in fact file a Designation of Record for the missing transcript, which she withdrew three days later on the basis that “she is no longer desirous of including this transcript as part of the record because this is [Appellant]’s responsibility.”

An incomplete appellate record is fatal to an appeal on the facts. “This Court’s authority to review a trial court’s decision is limited to those issues for which an adequate legal record has been preserved.” *Taylor v. Allstate Ins. Co.*, 158 S.W.3d 929, 931 (Tenn.Ct.App.2004). Further, “[t]he appellant has the primary responsibility to prepare a factual record containing a full, accurate and complete account of the evidence presented at trial.” *In re SLD*, 2006 Tenn. App. LEXIS 267 at *11 (Tenn. App. April 26, 2006); *See McDonald v. Onoh*, 772 S.W.2d 913, 914 (Tenn. Ct. App.1989). This Court has stated:

Where the issues raised go to the evidence, there must be a transcript. In the absence of a transcript of the evidence, there is a conclusive presumption that there was sufficient evidence before the trial court to support its judgment, and this Court must therefore affirm the judgment. *McKinney v. Educator and Executive Insurers, Inc.*, 569 S.W.2d 829, 832 (Tenn. App. 1977)....The burden is likewise on the appellant

² Tennessee Rule of Appellate Procedure 26(b) states in relevant part:

Dismissal for Failure of Appellant Timely to File the Transcript or Statement. – If the appellant shall fail to file the transcript or statement within the time specified in Rule 24(b) or (c), or if the appellant shall fail to follow the procedure in Rule 24(d) when no transcript or statement is to be filed, any appellee may file a motion in the appellate court to dismiss the appeal....In lieu of granting the motion or at any time on its own motion, the appellate court may order filing of the transcript or statement.

to provide the Court with a transcript of the evidence or a statement of the evidence from which this Court can determine if the evidence does preponderate for or against the findings of the trial court. The appellant has failed to carry this burden. This issue is without merit.

Coakley v. Daniels, 840 S.W.2d 367, 370 (Tenn.Ct.App.1992).

Tennessee Rules of Appellate Procedure 24(b) and (c) provide guidelines regarding appellant's responsibilities concerning the appellate record, stating in relevant part:

(b) Transcript of Stenographic or Other Substantially Verbatim Recording of Evidence or Proceedings. – If a stenographic report or other contemporaneously recorded, substantially verbatim recital of the evidence or proceedings is available, the appellant shall have prepared a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal.

(c) Statement of the Evidence When No Report, Recital, or Transcript Is Available. – If no stenographic report, substantially verbatim recital or transcript of the evidence or proceedings is available, the appellant shall prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement should convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal.

In *Sherrod v. Wix*, 849 S.W.2d 780 (Tenn.Ct.App.1992), involving a divorce and child custody, the mother was awarded custody of the parties' minor son. The father sought custody of him, challenging the trial court's alteration of his visitation schedule. However, this Court did not receive a transcript of the trial court proceedings. Regarding the lack of knowledge of the lower court proceedings, this Court stated that:

Our ability to deal with this issue is hampered by the absence of either a transcript of the proceedings in the trial court or a statement of the evidence prepared in accordance with Tenn. R. App. P. 24(c).

When a trial court decides a case without a jury, it's [sic] findings of fact are presumed to be correct unless the evidence in the record preponderates against them. Tenn. R. App. P. 13(d). This court cannot review the facts de novo without an appellate record containing the facts, and therefore, we must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings. *McDonald v. Onoh*, 772 S.W.2d 913, 914 (Tenn. Ct. App. 1989); *Irvin v. City of Clarksville*, 767 S.W.2d 649, 653 (Tenn. Ct. App. 1987); *Gotten v. Gotten*, 748 S.W.2d 430, 432 (Tenn. Ct. App. 1988).

Sherrod, 849 S.W.2d at 783.

In 1993, the Supreme Court of Tennessee stated the following in regard to the incomplete appellate record issue:

When a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal. *State v. Bunch*, 646 S.W.2d 158, 160 (Tenn.1983). Where the record is incomplete and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which the party relies, an appellate court is precluded from considering the issue. *State v. Roberts*, 755 S.W.2d 833, 836 (Tenn.Cr.App.1988). Absent the necessary relevant material in the record an appellate court cannot consider the merits of an issue. See T.R.A.P. 24(b). The defendant has failed to properly preserve this issue for appeal.

State v. Ballard, 855 S.W.2d 557, 560-561 (Tenn.1993).

If no additional evidence had been offered during the new trial, this Court could conduct a proper review. However, as noted during oral argument before this Court, additional evidence was provided at the new trial, and therefore this Court, lacking any record of such evidence upon which the trial court, at least in part, predicated its ruling must affirm the judgment.

IV. CONCLUSION

The judgement of the trial court is affirmed due to the incomplete appellate record. Costs of the appeal are assessed to Appellant.

WILLIAM B. CAIN, JUDGE